

February 17, 1999

In the Matter of: *

*

Corinne B. Bessey *

(Widow of Stanley S. Bessey) *

Claimant *

*

v. *

Case No. 1998-LHC-2164

*

Bath Iron Works Corporation *

Employer/Self-Insurer *

*

OWCP No. 1-143440

and *

*

Commercial Union Companies *

Liberty Mutual Insurance Co. *

Carriers *

*

and *

*

Director, Office of Workers' *

Compensation Programs, United *

States Department of Labor *

Party-in-Interest *

Appearances:

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For Liberty Mut. Ins. Co.

Before: **DAVID W. DI NARDI**
Administrative Law Judge

DECISION AND ORDER - AWARDING BENEFITS

This is a claim for worker's compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended (33 U.S.C. §901, **et seq.**), herein referred to as the "Act." The hearing was held on December 9, 1998 in Portland, Maine at which time all parties were given the opportunity to present evidence and oral arguments. Post-hearing briefs were not requested herein. The following references will be used: TR for the official hearing transcript, ALJ EX for an exhibit offered by this Administrative Law Judge, CX for a Claimant's exhibit, DX for a Director's exhibit, EX for an Employer's exhibit and RX for an exhibit submitted by Liberty Mutual Insurance Company. This decision is being rendered after having given full consideration to the entire record.

Post-hearing evidence has been admitted as:

Exhibit No.	Item	Filing Date
CX 34	Attorney Lupton's letter filing the	12/23/98
CX 35	December 17, 1998 report of Paul LaProd, M.D.	12/23/98
CX 36	Attorney Lupton's letter filing his	01/11/99
CX 37	Fee Petition	01/11/99

The record was closed on January 11, 1999 as no further documents were filed.

Stipulations and Issues

The parties stipulate, and I find:

1. The Act applies to this proceeding.
2. Decedent and the Employer were in an employee-employer relationship at the relevant times.
3. On January 22, 1998, Claimant alleges that her husband suffered an injury in the course and scope of his employment.
4. Claimant gave the Employer notice of the injury in a timely fashion.
5. Claimant filed a timely claim for compensation and the Employer filed a timely notice of controversion.
6. The parties attended an informal conference on May 7, 1998.
7. The applicable average weekly wage is the National Average Weekly Wage as of the date of injury.
8. The Employer and its Carriers have paid no benefits herein.

The unresolved issues in this proceeding are:

1. Whether Decedent's malignant mesothelioma constitutes a work-related injury.
2. If so, the nature and extent of his disability and/or impairment.
3. Entitlement to medical benefits, reimbursement of out-of-pocket medical expenses paid by Claimant or Decedent and interest on unpaid benefits.
4. Responsible Carrier.
5. The applicability of Section 8(f) of the Act.

Summary of the Evidence

Stanley S. Bessey ("Decedent" herein), who was born on December 7, 1916, had a tenth grade formal education and an employment history of manual labor; he began work on August 18, 1952 as a painter/third class at the Bath, Maine Shipyard of the Bath Iron Works Corporation ("Employer"), a maritime facility adjacent to the navigable waters of the Kennebec River where the Employer builds, repairs and overhauls vessels. He continued to work at the shipyard either as a painter or ship cleaner, except for several short layoffs, until January 31, 1982, at which time Decedent, having just attained the age of 65, took a "normal

retirement under (the company) pension plan for hourly employees." (CX 14; TR 20-21)

Decedent passed away before his deposition could be taken and Claimant has offered the testimony of John O. LeMont (CX 15) and Larry L. Burham (CX 16) and Liberty Mutual has offered the testimony of William A. Lowell, II (RX 1) to establish the nature of shipyard work pertinent herein.

John O. LeMont, who began working at the Employer's shipyard in September of 1964 as a ship cleaner, knew and worked with Decedent for many years. As a ship cleaner Mr. LeMont "worked with the brush painters cleaning up the mess made by the shipfitters and welders and burners and pipe fitters," as well as other trades performing their assigned duties in the compartments and innerbottoms of the vessels. Decedent and Mr. LeMont worked closely together as they had to clean out all of the debris to prepare the areas for painting. They worked in "just about every room on the ship," including the machinery spaces, fire rooms, engine rooms and elsewhere. Particularly dirty work was cleaning up after the pipe covers, pipefitters and the other trades had completed their work, including the cutting, installation and application of asbestos sheets as insulation around the pipes, machinery and other equipment. (CX 15 at 3-5)

As part of their cleaning work, and prior to the days of air-fed respirators, and as the areas to be cleaned were filled with asbestos dust and fibers flying around the ambient air of the work environment, Mr. LeMont and others improvised face masks by "put(ting) Vaseline in our nose and wrap(ping) cheesecloth around our face" because the use of air hoses, brooms and other cleaning material caused the asbestos dust to further fly around the work area. Large pieces of debris were picked up and placed in dumpsters and, according to Mr. LeMont, "Every room on the ship, if they had heat, had asbestos." Moreover, ship cleaners and brush painters would work in close proximity to a pipe coverer who, for instance, might be called in to repair a section of pipe where a leak was detected; such work would also expose Mr. LeMont and Decedent to further asbestos exposure. Sometimes there was so much asbestos debris in the rooms that the work area "was knee deep" in asbestos and "(w)e filled garbage cans and lugged them out." Furthermore, overhauls or conversions of already commissioned vessels was especially dirty work because the old asbestos had to be first cut away and removed and replaced with newer pipe and insulation. After awhile Mr. LeMont and Decedent switched to work on the second shift as spray painters because that work "was almost twice the money." However, during slack times, Decedent and Mr. LeMont returned to work cleaning the ships prior to inspection by the U.S. Navy and prior to final painting and cleaning. Mr. LeMont continued to be exposed to asbestos until 1978, at which time he left because of a reaction to epoxy paint. He and Decedent worked on every conversion that came into the shipyard. Toward the end of his shipyard employment Mr. LeMont, as a spray painter, was provided a respirator but brush painters, such as Decedent, were not provided respirators. Mr. LeMont and Decedent also worked on

the civilian ships built at the shipyard, all of which ships also contained asbestos wherever there were pipes. (CX 15 at 5-13)

Asbestos was applied in various forms, such as sheets, blankets and so-called paste or mud. Exposure to and inhalation of asbestos dust and fibers occurred on a daily basis at the shipyard. (CX 15 at 14-16) Mr. LeMont testified that he has an asbestos-related disease. (CX 15 at 16) Decedent and Mr. LeMont worked in Department 27 and both were laid-off for short periods of time and they were transferred to other work when it was available. He and Decedent did not socialize outside of work and they had no contact after leaving the shipyard "other than seeing him in the stores," in Bath and Brunswick, engaging in the usual conversation of former co-workers. (CX 15 at 16-22)

Larry L. Burnham, who is still employed at the shipyard, began working there in November of 1960 as a cleaner and he also knew and worked with the Decedent. Decedent, a friend of Mr. Burnham's father, and Mr. Burnham worked in Department 27, and, as cleaners, they also did some "brush painting, cleaning, grinding, whatever had to be done;" they both did the same type of work from 1960 to 1963, at which time Mr. Burnham was laid-off for ten (10) months or so, returning to the shipyard on June 8, 1964, after which time he did not work with the Decedent. (CX 16 at 3-5)

Decedent and Mr. Burnham worked together on first shift, primarily in the "machinery spaces," and they had duties of removing debris and cleaning the rooms where, for instance, pipe coverers had been cutting, sizing and applying asbestos as insulation around the pipes, machinery and equipment. Asbestos was applied in sheet, cloth and so-called "mud" form, *i.e.*, after mixing asbestos powder and water, the cutting and installation of asbestos caused asbestos dust and fibers to fly around the ambient air of the work environment. The mixing was first done on the vessel at the job site and then in the yard at a Quonset hut. Mr. Burnham also worked on conversions and it would be their task to remove the asbestos debris, put it into garbage cans and place it in "big dumpsters in there." Mr. Burnham also switched to second shift as a spray painter at twice the money he earned as a cleaner. Mr. Burnham corroborated Mr. LeMont's testimony as to the daily exposure of asbestos while at the shipyard, only in his case from 1960 to September of 1963; he also has a claim against the Employer for asbestos-related disease. (CX 16 at 5-13)

Mr. Burnham, who was union shop steward for 23 years and chief steward for 9 years, continued to go on the vessels from 1963 to 1982, saw Decedent working on the boats as a brush painter, and that the Employer was still using asbestos through 1982 because it was being cut out from vessels being converted, Mr. Burnham remarking, Decedent, as a brush painter, would have continued to work on overhauls until his last day of work on January 31, 1982. In their early days at the shipyard, painters and cleaners would eat their lunch in the buildings and rooms where they would later work because they did not have a separate lunch room, Mr. Burnham further remarking, the buildings were "dirty" because the asbestos

"stuff (was) hanging down" in the room where they had their lunch. (CX 16 at 13-23)

Decedent's medical records reflect that he went to see his family physician, Dr. Karl Miller, on June 3, 1997 for evaluation of "several blackened areas on the side of his face." Dr. Miller, taking a history report of asbestos exposure, scheduled a biopsy (CX 3) and advised Decedent he should have an annual physical examination. (CX 2 at 16-19) Dr. Miller next saw Decedent on November 10, 1997, at which time Decedent was complaining of "an episode of an uncomfortable feeling in his right chest four nights" earlier; the doctor recommended an EKG and suspected a "musculoskeletal strain." Dr. Miller next saw Claimant on December 19, 1997 complaining of a cough, wheezing and dyspnea with exertion for a week or so and the doctor's assessment was right lower lobe pneumonia with underlying COPD. Medications were prescribed and four days later Decedent was "improved." (CX 2 at 20-21)

However, on January 14, 1998 Decedent went to Urgent Care with complaints of dyspnea and confusion and he was hospitalized. Diagnostic tests were performed (CX 4 - CX 8) and, as of January 22, 1998, Dr. Miller advised Mr. and Mrs. Bessey that Decedent had malignant mesothelioma and had a life expectancy of two (2) years. (CX 2 at 22-24) Decedent's condition rapidly deteriorated and he passed away on February 25, 1998 and Dr. Miller has certified as the immediate cause of death mesothelioma due to or as a consequence of asbestosis. COPD and tobacco use were identified by Dr. Miller as other significant conditions contributing to death. (CX 12)

Stanley S. Bessey ("Decedent") and Corinne Bartlett ("Claimant") were married on May 9, 1948 and Claimant was living with Decedent at the time of his death. (CX 13) Claimant has not remarried and Funeral expenses totalled \$2,820.00. (CX 11 at 163-64; TR 21-22, 25-27)

On the basis of the totality of this record and having observed the demeanor and heard the testimony of a credible Claimant, I make the following:

Findings of Fact and Conclusions of Law

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain Trimmers Association, Inc.**, 390 U.S. 459 (1968), **reh. denied**, 391 U.S. 929 (1969); **Todd Shipyards v. Donovan**, 300 F.2d 741 (5th Cir. 1962); **Scott v. Tug Mate, Incorporated**, 22 BRBS 164, 165, 167 (1989); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Anderson v. Todd Shipyard Corp.**, 22 BRBS 20, 22 (1989); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard, Inc.**, 14 BRBS 148.9 (1981); **Brandt v. Avondale Shipyards, Inc.**,

8 BRBS 698 (1978); **Sargent v. Matson Terminal, Inc.**, 8 BRBS 564 (1978).

The Act provides a presumption that a claim comes within its provisions. See 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." **Swinton v. J. Frank Kelly, Inc.**, 554 F.2d 1075 (D.C. Cir. 1976), cert. denied, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. **Golden v. Eller & Co.**, 8 BRBS 846 (1978), aff'd, 620 F.2d 71 (5th Cir. 1980); **Hampton v. Bethlehem Steel Corp.**, 24 BRBS 141 (1990); **Anderson v. Todd Shipyards**, supra, at 21; **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "**prima facie**" case. The Supreme Court has held that "[a] **prima facie** 'claim for compensation,' to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." **United States Indus./Fed. Sheet Metal, Inc., v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor**, 455 U.S. 608, 615 102 S. Ct. 1318, 14 BRBS 631, 633 (CRT) (1982), rev'g **Riley v. U.S. Indus./Fed. Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." **Id.** The presumption, though, is applicable once claimant establishes that he has sustained an injury, i.e., harm to his body. **Preziosi v. Controlled Industries**, 22 BRBS 468, 470 (1989); **Brown v. Pacific Dry Dock Industries**, 22 BRBS 284, 285 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56, 59 (1985); **Kelaita v. Triple A. Machine Shop**, 13 BRBS 326 (1981).

To establish a **prima facie** claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. **Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984); **Kelaita**, supra. Once this **prima facie** case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. **Parsons Corp. of California v. Director, OWCP**, 619 F.2d 38 (9th Cir. 1980); **Butler v. District Parking Management Co.**, 363 F.2d 682 (D.C. Cir. 1966); **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301, 305 (1989); **Kier**, supra. Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the

employer to establish that claimant's condition was not caused or aggravated by his employment. **Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. **Del Vecchio v. Bowers**, 296 U.S. 280 (1935); **Volpe v. Northeast Marine Terminals**, 671 F.2d 697 (2d Cir. 1981); **Holmes v. Universal Maritime Serv. Corp.**, 29 BRBS 18 (1995). In such cases, I must weigh all of the evidence relevant to the causation issue. **Sprague v. Director, OWCP**, 688 F.2d 862 (1st Cir. 1982); **Holmes, supra**; **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (1986).

To establish a **prima facie** case for invocation of the Section 20(a) presumption, claimant must prove that (1) he suffered a harm, and (2) an accident occurred or working conditions existed which could have caused the harm. *See, e.g.,* **Noble Drilling Company v. Drake**, 795 F.2d 478, 19 BRBS 6 (CRT) (5th Cir. 1986); **James v. Pate Stevedoring Co.**, 22 BRBS 271 (1989). If claimant's employment aggravates a non-work-related, underlying disease so as to produce incapacitating symptoms, the resulting disability is compensable. *See* **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986); **Gardner v. Bath Iron Works Corp.**, 11 BRBS 556 (1979), *aff'd sub nom. Gardner v. Director, OWCP*, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981). If employer presents "specific and comprehensive" evidence sufficient to sever the connection between claimant's harm and his employment, the presumption no longer controls, and the issue of causation must be resolved on the whole body of proof. *See, e.g.,* **Leone v. Sealand Terminal Corp.**, 19 BRBS 100 (1986).

Employer contends that Claimant did not establish a **prima facie** case of causation and, in the alternative, that there is substantial evidence of record to rebut the Section 20(a), 33 U.S.C. §920(a), presumption. I reject both contentions. The Board has held that credible complaints of subjective symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case for Section 20(a) invocation. *See* **Sylvester v. Bethlehem Steel Corp.**, 14 BRBS 234, 236 (1981), *aff'd*, 681 F.2d 359, 14 BRBS 984 (5th Cir. 1982). Moreover, I may properly rely on Claimant's statements to establish that her husband experienced a work-related harm, and as it is undisputed that a work accident occurred which could have caused the harm, the Section 20(a) presumption is invoked in this case. *See, e.g.,* **Sinclair v. United Food and Commercial Workers**, 23 BRBS 148, 151 (1989). Moreover, Employer's general contention that the clear weight of the record evidence establishes rebuttal of the pre-presumption is not sufficient to rebut the presumption. *See generally* **Miffleton v. Briggs Ice Cream Co.**, 12 BRBS 445 (1980).

The presumption of causation can be rebutted only by "substantial evidence to the contrary" offered by the employer. 33 U.S.C. §920. What this requirement means is that the employer must offer evidence which completely **rules out the** connection between the alleged event and the alleged harm. In **Caudill v. Sea**

Tac Alaska Shipbuilding, 25 BRBS 92 (1991), the carrier offered a medical expert who testified that an employment injury did not "play a significant role" in contributing to the back trouble at issue in this case. The Board held such evidence insufficient as a matter of law to rebut the presumption because the testimony did not completely rule out the role of the employment injury in contributing to the back injury. **See also Cairns v. Matson Terminals, Inc.**, 21 BRBS 299 (1988) (medical expert opinion which did entirely attribute the employee's condition to non-work-related factors was nonetheless insufficient to rebut the presumption where the expert equivocated somewhat on causation elsewhere in his testimony). Where the employer/carrier can offer testimony which completely severs the causal link, the presumption is rebutted. **See Phillips v. Newport News Shipbuilding & Dry Dock Co.**, 22 BRBS 94 (1988) (medical testimony that claimant's pulmonary problems are consistent with cigarette smoking rather than asbestos exposure sufficient to rebut the presumption).

For the most part only medical testimony can rebut the Section 20(a) presumption. **But see Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989) (holding that asbestosis causation was not established where the employer demonstrated that 99% of its asbestos was removed prior to the claimant's employment while the remaining 1% was in an area far removed from the claimant and removed shortly after his employment began). Factual issues come in to play only in the employee's establishment of the **prima facie** elements of harm/possible causation and in the later factual determination once the Section 20(a) presumption passes out of the case.

Once rebutted, the presumption itself passes completely out of the case and the issue of causation is determined by examining the record "as a whole." **Holmes v. Universal Maritime Services Corp.**, 29 BRBS 18 (1995). Prior to 1994, the "true doubt" rule governed the resolution of all evidentiary disputes under the Act; where the evidence was in equipoise, all factual determinations were resolved in favor of the injured employee. **Young & Co. v. Shea**, 397 F.2d 185, 188 (5th Cir. 1968), **cert. denied**, 395 U.S. 920, 89 S. Ct. 1771 (1969). The Supreme Court held in 1994 that the "true doubt" rule violated the Administrative Procedure Act, the general statute governing all administrative bodies. **Director, OWCP v. Greenwich Collieries**, 512 U.S. 267, 114 S. Ct. 2251, 28 BRBS 43 (CRT) (1994). Accordingly, after **Greenwich Collieries** the employee bears the burden of proving causation by a preponderance of the evidence after the presumption is rebutted.

As neither party disputes that the Section 20(a) presumption is invoked, **see Kelaita v. Triple A Machine Shop**, 13 BRBS 326 (1981), the burden shifts to employer to rebut the presumption with substantial evidence which establishes that claimant's employment did not cause, contribute to, or aggravate his condition. **See Peterson v. General Dynamics Corp.**, 25 BRBS 71 (1991), **aff'd sub nom. Insurance Company of North America v. U.S. Dept. of Labor**, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), **cert. denied**, 507 U.S. 909, 113 S. Ct. 1264 (1993); **Obert v. John T. Clark and Son of**

Maryland, 23 BRBS 157 (1990); **Sam v. Loffland Brothers Co.**, 19 BRBS 228 (1987). The unequivocal testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. See **Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). If an employer submits substantial countervailing evidence to sever the connection between the injury and the employment, the Section 20(a) presumption no longer controls and the issue of causation must be resolved on the whole body of proof. **Stevens v. Tacoma Boatbuilding Co.**, 23 BRBS 191 (1990). This Administrative Law Judge, in weighing and evaluation all of the record evidence, may place greater weight on the opinions of the employee's treating physician as opposed to the opinion of an examining or consulting physician. In this regard, see **Pietrunti v. Director, OWCP**, 119 F.3d 1035, 31 BRBS 84 (CRT)(2d Cir. 1997).

In the case **sub judice**, Claimant alleges that the harm to his bodily frame, **i.e.**, his asbestosis and mesothelioma resulted from working conditions and/or resulted from his exposure to and inhalation of asbestos at the Employer's facility. The Employer has introduced no evidence severing the connection between such harm and Claimant's maritime employment. In this regard, see **Romeike v. Kaiser Shipyards**, 22 BRBS 57 (1989). Thus, Claimant has established a **prima facie** claim that such harm is a work-related injury, as shall now be discussed.

Injury

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. See 33 U.S.C. §902(2); **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1312 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. **Gardner v. Bath Iron Works Corporation**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385 (1st Cir. 1981); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Janusiewicz v. Sun Shipbuilding and Dry Dock Company**, 22 BRBS 376 (1989) (**Decision and Order on Remand**); **Johnson v. Ingalls Shipbuilding**, 22 BRBS 160 (1989); **Madrid v. Coast Marine Construction**, 22 BRBS 148 (1989). Moreover, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. **Strachan Shipping v. Nash**, 782 F.2d 513 (5th Cir. 1986); **Independent Stevedore Co. v. O'Leary**, 357 F.2d 812 (9th Cir. 1966); **Kooley v. Marine Industries Northwest**, 22 BRBS 142 (1989); **Mijangos v. Avondale Shipyards, Inc.**, 19 BRBS 15 (1986); **Rajotte v. General**

Dynamics Corp., 18 BRBS 85 (1986). Also, when claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. **Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983); **Mijangos, supra**; **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work-related conditions. **Lopez v. Southern Stevedores**, 23 BRBS 295 (1990); **Care v. WMATA**, 21 BRBS 248 (1988).

In occupational disease cases, there is no "injury" until the accumulated effects of the harmful substance manifest themselves and claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease and the death or disability. **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137 (2d Cir. 1955), **cert. denied**, 350 U.S. 913 (1955); **Thorud v. Brady-Hamilton Stevedore Company, et al.**, 18 BRBS 232 (1987); **Geisler v. Columbia Asbestos, Inc.**, 14 BRBS 794 (1981). Nor does the Act require that the injury be traceable to a definite time. The fact that claimant's injury occurred gradually over a period of time as a result of continuing exposure to conditions of employment is no bar to a finding of an injury within the meaning of the Act. **Bath Iron Works Corp. v. White**, 584 F.2d 569 (1st Cir. 1978).

In his December 17, 1998 letter to Claimant's counsel (CX 35), Dr. Paul J. LaProd, a pulmonary and critical care specialist, states as follows:

"Regarding your letter dated December 16, 1998, regarding Stanley Bessey, the following comments can be made:

1. I initially cared for Mr. Bessey during his Midcoast hospitalization pneumoconiosis January 15, 1998. At that time a diagnostic/therapeutic thorocentesis was performed. Malignant mesothelioma was diagnosed. This is a direct consequence of his exposure to asbestos during his employment several decades ago at Bath Iron Works.
2. Mr. Bessey presented to the hospital with disabling dyspnea. In spite of available interventions, his dyspnea persisted. He became dependent on others for his total care. His appetite, weight, energy, and activity level markedly declined.

"Ultimately, Mr. Bessey was discharged from Midcoast Hospital on February 5, 1998, with the assistance of home visiting nurses and health aids to provide his total care. He remained continuously dependent upon supplemental oxygen. Due to his severe debility, pulmonary function studies were not attainable."

This closed record conclusively establishes, and I so find and conclude, that Decedent's mesothelioma directly resulted from his exposure to inhalation of asbestos dust and fibers as a maritime employee at the Employer's shipyard, that the date of injury is January 22, 1998, that the Employer had timely notice of Decedent's injury and his death and that Claimant timely filed for benefits for herself and for her husband once a dispute arose between the parties. In fact, the principal issue is the nature and extent of Decedent's disability, an issue I shall now resolve.

Nature and Extent of Disability

It is axiomatic that disability under the Act is an economic concept based upon a medical foundation. **Quick v. Martin**, 397 F.2d 644 (D.C. Cir. 1968); **Owens v. Traynor**, 274 F. Supp. 770 (D.Md. 1967), **aff'd**, 396 F.2d 783 (4th Cir. 1968), **cert. denied**, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. **Nardella v. Campbell Machine, Inc.**, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to claimant's age, education, industrial history and the availability of work he can perform after the injury. **American Mutual Insurance Company of Boston v. Jones**, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. (**Id.** at 1266)

The Board has held that an irreversible medical condition is permanent **per se**. **Drake v. General Dynamics Corp.**, 11 BRBS 288 (1979). Mesothelioma, in my judgment, is such a condition, according to Dr. LaProd. (CX 35)

Average Weekly Wage

For the purposes of Section 10 and the determination of the employee's average weekly wage with respect to a claim for compensation for death or disability due to an occupational disability, the time of injury is the date on which the employee or claimant becomes aware, or on the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability. **Todd Shipyards Corp. v. Black**, 717 F.2d 1280 (9th Cir. 1983); **Hoey v. General Dynamics Corporation**, 17 BRBS 229 (1985); **Pitts v. Bethlehem Steel Corp.**, 17 BRBS 17 (1985); **Yalowchuck v. General Dynamics Corp.**, 17 BRBS 13 (1985).

The 1984 Amendments to the Longshore Act apply a new set of rules in occupational disease cases where the time of injury (**i.e.**, becomes manifest) occurs after claimant has retired. **See Woods v. Bethlehem Steel Corp.**, 17 BRBS 243 (1985); 33 U.S.C. §§902(10), 908(C)(23), 910(d)(2). In such cases, disability is defined under Section 2(10) not in terms of loss of earning capacity, but rather in terms of the degree of physical impairment as determined under the guidelines promulgated by the American Medical Association. An employee cannot receive total disability benefits under these

provisions, but can only receive a permanent partial disability award based upon the degree of physical impairment. **See** 33 U.S.C. §908(c)(23); 20 C.F.R. §702.601(b). The Board has held that, in appropriate circumstances, Section 8(c)(23) allows for a permanent partial impairment award based on a one hundred (100) percent physical impairment. **Donnell v. Bath Iron Works Corporation**, 22 BRBS 136 (1989). Further, where the injury occurs more than one year after retirement, the average weekly wage is based on the National Average Weekly Wage as of the date of awareness rather than any actual wages received by the employee. **See** 33 U.S.C. §910(c)(2)(B); **Taddeo v. Bethlehem Steel Corp.**, 22 BRBS 52 (1989); **Smith v. Ingalls Shipbuilding**, 22 BRBS 46 (1989). Thus, it is apparent that Congress, by the 1984 Amendments, intended to expand the category of claimants entitled to receive compensation to include voluntary retirees.

However, in the case at bar, Claimant may be an involuntary retiree if he left the workforce because of work-related pulmonary problems. Thus, an employee who involuntarily withdraws from the workforce due to an occupational disability may be entitled to total disability benefits although the awareness of the relationship between disability and employment did not become manifest until after the involuntary retirement. In such cases, the average weekly wage is computed under 33 U.S.C. §910(C) to reflect earnings prior to the onset of disability rather than earnings at the later time of awareness. **MacDonald v. Bethlehem Steel Corp.**, 18 BRBS 181, 183 and 184 (1986). **Compare LaFaille v. General Dynamics Corp.**, 18 BRBS 882 (1986), **rev'd in relevant part sub nom. LaFaille v. Benefits Review Board**, 884 F.2d 54, 22 BRBS 108 (CRT) (2d Cir. 1989).

Thus, where disability commences on the date of involuntary withdrawal from the workforce, claimant's average weekly wage should reflect wages prior to the date of such withdrawal under Section 10(c), rather than the National Average Weekly Wage under Section 10(d)(2)(B).

However, if the employee retires due to a non-occupational disability prior to manifestation, then he is a voluntary retiree and is subject to the post-retirement provisions. In **Woods v. Bethlehem Steel Corp.**, 17 BRBS 243 (1985), the Benefits Review Board applied the post-retirement provisions because the employee retired due to disabling non-work-related heart disease prior to the manifestation of work-related asbestosis.

Claimant is a voluntary retiree as he took a regular retirement on January 31, 1982 (CX 14) and as his mesothelioma was not diagnosed until January 22, 1998, during a hospitalization which began on January 14, 1998. Accordingly, Decedent's estate is entitled to permanent partial impairment benefits for his one hundred (100%) percent impairment, pursuant to **Donnell v. Bath Iron Works**, 22 BRBS 136 (1989), from January 14, 1998 through February 24, 1998, based upon the National Average Weekly Wage of \$417.87 as of that date. Death Benefits to Claimant shall begin on February

25, 1998.

Death Benefits and Funeral Expenses Under Section 9

Pursuant to the 1984 Amendments to the Act, Section 9 provides Death Benefits to certain survivors and dependents if a work-related injury causes an employee's death. This provision applies with respect to any death occurring after the enactment date of the Amendments, September 28, 1984. 98 Stat. 1655. The provision that Death Benefits are payable only for deaths due to employment injuries is the same as in effect prior to the 1972 Amendments. The carrier at risk at the time of decedent's injury, not at the time of death, is responsible for payment of Death Benefits. **Spence v. Terminal Shipping Co.**, 7 BRBS 128 (1977), **aff'd sub. nom. Pennsylvania National Mutual Casualty Insurance Co. v. Spence**, 591 F.2d 985, 9 BRBS 714 (4th Cir. 1979), **cert. denied**, 444 U.S. 963 (1975); **Marshall v. Looney's Sheet Metal Shop**, 10 BRBS 728 (1978), **aff'd sub. nom. Travelers Insurance Co. v. Marshall**, 634 F.2d 843, 12 BRBS 922 (5th Cir. 1981).

A separate Section 9 claim must be filed in order to receive benefits under Section 9. **Almeida v. General Dynamics Corp.**, 12 BRBS 901 (1980). This Section 9 claim must comply with Section 13. **See Wilson v. Vecco Concrete Construction Co.**, 16 BRBS 22 (1983); **Stark v. Bethlehem Steel Corp.**, 6 BRBS 600 (1977). Section 9(a) provides for reasonable funeral expenses not exceeding \$3,000. 33 U.S.C.A. §909(a) (West 1986). Prior to the 1984 Amendments, this amount was \$1,000. This subsection contemplates that payment is to be made to the person or business providing funeral services or as reimbursement for payment for such services, and payment is limited to the actual expenses incurred up to \$3,000. Claimant is entitled to appropriate interest on funeral benefits untimely paid. **Adams v. Newport News Shipbuilding and Dry Dock Company**, 22 BRBS 78, 84 (1989).

Section 9(b) which provides the formula for computing Death Benefits for surviving spouses and children of Decedents must be read in conjunction with Section 9(e) which provides minimum benefits. **Dunn v. Equitable Equipment Co.**, 8 BRBS 18 (1978); **Lombardo v. Moore-McCormack Lines, Inc.**, 6 BRBS 361 (1977); **Gray v. Ferrary Marine Repairs**, 5 BRBS 532 (1977).

Section 9(e), as amended in 1984, provides a maximum and minimum death benefit level. Prior to the 1972 Amendments, Section 9(e) provided that in computing Death Benefits, the average weekly wage of Decedent could not be greater than \$105 nor less than \$27, but total weekly compensation could not exceed Decedent's weekly wages. Under the 1972 Amendments, Section 9(e) provided that in computing Death Benefits, Decedent's average weekly wage shall not be less than the National Average Weekly Wage under Section 6(b), but that the weekly death benefits shall not exceed decedent's actual average weekly wage. **See Dennis v. Detroit Harbor Terminals**, 18 BRBS 250 (1986), **aff'd sub nom. Director, OWCP v. Detroit Harbor Terminals, Inc.**, 850 F.2d 283 21 BRBS 85 (CRT) (6th

Cir. 1988); **Dunn, supra; Lombardo, supra; Gray, supra.**

In **Director, OWCP v. Rasmussen**, 440 U.S. 29, 9 BRBS 954 (1979), **aff'g** 567 F.2d 1385, 7 BRBS 403 (9th Cir. 1978), **aff'g sub. nom. Rasmussen v. GEO Control, Inc.**, 1 BRBS 378 (1975), the Supreme Court held that the maximum benefit level of Section 6(b)(1) did not apply to Death Benefits, as the deletion of a maximum level in the 1972 Amendment was not inadvertent. The Court affirmed an award of \$532 per week, two-thirds of the employee's \$798 average weekly wage.

However, the 1984 amendments have reinstated that maximum limitation and Section 9(e) currently provides that average weekly wage shall not be less than the National Average Weekly Wage, but benefits may not exceed the lesser of the average weekly wage of Decedent or the benefits under Section 6(b)(1).

In view of these well-settled principles of law, I find and conclude that Claimant, as the surviving Widow of Decedent, is entitled to an award of Death Benefits, commencing on February 25, 1998, the date of her husband's death, based upon the Average Weekly Wage \$417.87, as of that date, pursuant to Section 6(b), as I find and conclude that Decedent's death resulted from his work-related pulmonary asbestosis and his cardiovascular disease, which conditions were first diagnosed and reported by Dr. Miller after Decedent's hospitalization from January 14, 1998 at the Mid-Coast Hospital. (CX 5 at 56 and 52) The Death Certificate certifies as the immediate cause of death, mesothelioma. (CX 12) Thus, I find and conclude that Decedent's death resulted from and was related to his work-related injury for which his estate will receive benefits from January 14, 1998 until his death on February 25, 1998.

Medical Expenses

An Employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. **Perez v. Sea-Land Services, Inc.**, 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. **Colburn v. General Dynamics Corp.**, 21 BRBS 219, 22 (1988); **Barbour v. Woodward & Lothrop, Inc.**, 16 BRBS 300 (1984). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. **Addison v. Ryan-Walsh Stevedoring Company**, 22 BRBS 32, 36 (1989); **Mayfield v. Atlantic & Gulf Stevedores**, 16 BRBS 228 (1984); **Dean v. Marine Terminals Corp.**, 7 BRBS 234 (1977). Furthermore, an employee's right to select his own physician, pursuant to Section 7(b), is well settled. **Bulone v. Universal Terminal and Stevedore Corp.**, 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injury. **Tough v. General Dynamics Corporation**, 22 BRBS 356 (1989); **Gilliam v. The Western Union Telegraph Co.**, 8 BRBS 278 (1978).

In **Shahady v. Atlas Tile & Marble**, 13 BRBS 1007 (1981), **rev'd on other grounds**, 682 F.2d 968 (D.C. Cir. 1982), **cert. denied**, 459 U.S. 1146, 103 S.Ct. 786 (1983), the Benefits Review Board held that a claimant's entitlement to an initial free choice of a physician under Section 7(b) does not negate the requirement under Section 7(d) that claimant obtain employer's authorization prior to obtaining medical services. **Banks v. Bath Iron Works Corp.**, 22 BRBS 301, 307, 308 (1989); **Jackson v. Ingalls Shipbuilding Division, Litton Systems, Inc.**, 15 BRBS 299 (1983); **Beynum v. Washington Metropolitan Area Transit Authority**, 14 BRBS 956 (1982). However, where a claimant has been refused treatment by the employer, he need only establish that the treatment he subsequently procures on his own initiative was necessary in order to be entitled to such treatment at the employer's expense. **Atlantic & Gulf Stevedores, Inc. v. Neuman**, 440 F.2d 908 (5th Cir. 1971); **Matthews v. Jeffboat, Inc.**, 18 BRBS at 189 (1986).

An employer's physician's determination that claimant is fully recovered is tantamount to a refusal to provide treatment. **Slattery Associates, Inc. v. Lloyd**, 725 F.2d 780 (D.C. Cir. 1984); **Walker v. AAF Exchange Service**, 5 BRBS 500 (1977). All necessary medical expenses subsequent to employer's refusal to authorize needed care, including surgical costs and the physician's fee, are recoverable. **Roger's Terminal and Shipping Corporation v. Director, OWCP**, 784 F.2d 687 (5th Cir. 1986); **Anderson v. Todd Shipyards Corp.**, 22 BRBS 20 (1989); **Ballesteros v. Willamette Western Corp.**, 20 BRBS 184 (1988).

Section 7(d) requires that an attending physician file the appropriate report within ten days of the examination. Unless such failure is excused by the fact-finder for good cause shown in accordance with Section 7(d), claimant may not recover medical costs incurred. **Betz v. Arthur Snowden Company**, 14 BRBS 805 (1981). **See also** 20 C.F.R. §702.422. However, the employer must demonstrate actual prejudice by late delivery of the physician's report. **Roger's Terminal, supra**.

It is well-settled that the Act does not require that an injury be disabling for a claimant to be entitled to medical expenses; it only requires that the injury be work related. **Romeike v. Kaiser Shipyards**, 22 BRBS 57 (1989); **Winston v. Ingalls Shipbuilding**, 16 BRBS 168 (1984); **Jackson v. Ingalls Shipbuilding**, 15 BRBS 299 (1983).

On the basis of the totality of the record, I find and conclude that Claimant has shown good cause, pursuant to Section 7(d). Claimant advised the Employer of Decedent's work-related injury on March 12, 1998 and requested appropriate medical care and treatment. However, the Employer did not accept the claim and did not authorize such medical care. Thus, any failure by Claimant to file timely the physician's report is excused for good cause as a futile act and in the interests of justice as the Employer refused to accept the claim.

Thus, the Employer is responsible for those out-of-pocket medical expenses in evidence as CX 11 totalling \$1,014.80 and Claimant shall be reimbursed for those immediately as those are reasonable and necessarily related to the work-related injury before me.

Interest

Although not specifically authorized in the Act, it has been accepted practice that interest at the rate of six (6) percent per annum is assessed on all past due compensation payments. **Avallone v. Todd Shipyards Corp.**, 10 BRBS 724 (1978). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. **Watkins v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 556 (1978), **aff'd in pertinent part and rev'd on other grounds sub nom. Newport News v. Director, OWCP**, 594 F.2d 986 (4th Cir. 1979); **Santos v. General Dynamics Corp.**, 22 BRBS 226 (1989); **Adams v. Newport News Shipbuilding**, 22 BRBS 78 (1989); **Smith v. Ingalls Shipbuilding**, 22 BRBS 26, 50 (1989); **Caudill v. Sea Tac Alaska Shipbuilding**, 22 BRBS 10 (1988); **Perry v. Carolina Shipping**, 20 BRBS 90 (1987); **Hoey v. General Dynamics Corp.**, 17 BRBS 229 (1985). The Board concluded that inflationary trends in our economy have rendered a fixed six percent rate no longer appropriate to further the purpose of making claimant whole, and held that ". . . the fixed six percent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills" **Grant v. Portland Stevedoring Company**, 16 BRBS 267, 270 (1984), **modified on reconsideration**, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258 provided that the above provision would become effective October 1, 1982. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

The Benefits Review Board has held that the employer must pay appropriate interest on untimely paid funeral benefits as funeral expenses are "compensation" under the Act. **Adams v. Newport News Shipbuilding**, 22 BRBS 78, 84 (1989).

Section 14(e)

Claimant is not entitled to an award of additional compensation, pursuant to the provisions of Section 14(e), as the Respondents timely controverted entitlement to benefits by both Claimant and Decedent. (CX 5, EX 6) **Ramos v. Universal Dredging Corporation**, 15 BRBS 140, 145 (1982); **Garner v. Olin Corp.**, 11 BRBS 502, 506 (1979).

Responsible Employer

The Employer and Commercial Union Companies ("Respondents" herein) are responsible for payment of benefits under the rule stated in **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137 (2d Cir. 1955), **cert. denied sub nom. Ira S. Bushey & Sons, Inc. v. Cardillo**, 350 U.S. 913 (1955). Under the last employer rule of **Cardillo**, the employer during the last employment in which the claimant was exposed to injurious stimuli, prior to the date upon which the claimant became aware of the fact that he was suffering from an occupational disease arising naturally out of his employment, should be liable for the full amount of the award. **Cardillo**, 225 F.2d at 145. See **Cordero v. Triple A. Machine Shop**, 580 F.2d 1331 (9th Cir. 1978), **cert. denied**, 440 U.S. 911 (1979); **General Dynamics Corporation v. Benefits Review Board**, 565 F.2d 208 (2d Cir. 1977). Claimant is not required to demonstrate that a distinct injury or aggravation resulted from this exposure. He need only demonstrate exposure to injurious stimuli. **Tisdale v. Owens Corning Fiber Glass Co.**, 13 BRBS 167 (1981), **aff'd mem. sub nom. Tisdale v. Director, OWCP, U.S. Department of Labor**, 698 F.2d 1233 (9th Cir. 1982), **cert. denied**, 462 U.S. 1106, 103 S.Ct. 2454 (1983); **Whitlock v. Lockheed Shipbuilding & Construction Co.**, 12 BRBS 91 (1980). For purposes of determining who is the responsible employer or carrier, the awareness component of the **Cardillo** test is identical to the awareness requirement of Section 12. **Larson v. Jones Oregon Stevedoring Co.**, 17 BRBS 205 (1985).

The Benefits Review Board has held that minimal exposure to some asbestos, even without distinct aggravation, is sufficient to trigger application of the **Cardillo** rule. **Grace v. Bath Iron Works Corp.**, 21 BRBS 244 (1988); **Lustig v. Todd Shipyards Corp.**, 20 BRBS 207 (1988); **Proffitt v. E.J. Bartells Co.**, 10 BRBS 435 (1979) (two days' exposure to the injurious stimuli satisfies **Cardillo**). Compare **Todd Pacific Shipyards Corporation v. Director, OWCP**, 914 F.2d 1317 (9th Cir. 1990), **rev'g Picinich v. Lockheed Shipbuilding**, 22 BRBS 289 (1989).

This closed record conclusively establishes that Decedent was last exposed to asbestos as a maritime employee at the Employer's shipyard on or about 1975. In so concluding, this Administrative Law Judge accepts the forthright testimony of William A. Lowell, II, who worked for the Employer from September of 1962 to June of 1995 in various supervisory positions, both at the Bath shipyard and at its Portland facility from September 1, 1989, and who testified that asbestos was used as insulation on the vessels, that asbestos was not used after 1974 because by then the hazards of asbestos became known, that fiberglass was substituted as insulation, that the U.S. Navy prohibited use of asbestos containing pipe covering materials in 1975 and that protective measures were taken beginning in 1975 relating to the so-called rip-outs or conversions of already commissioned vessels. According to Mr. Lowell, Decedent would not have been exposed to asbestos after 1976 because after that date only Department 30 was involved in asbestos removal, and Decedent worked only in Department 27. (RX 1) Any contrary testimony as to the last use of asbestos at the shipyard is rejected as vague and speculative.

Thus, as Commercial Union Companies was the Carrier on the risk from January 1, 1963 through February 28, 1981, Commercial Union Companies are responsible for all of the benefits awarded herein. (TR 5-6)

Section 8(f) of the Act

Regarding the Section 8(f) issue, the essential elements of that provision are met, and employer's liability is limited to one hundred and four (104) weeks, if the record establishes that (1) the employee had a pre-existing permanent partial disability, (2) which was manifest to the employer prior to the subsequent compensable injury and (3) which combined with the subsequent injury to produce or increase the employee's permanent total or partial disability, a disability greater than that resulting from the first injury alone. **Lawson v. Suwanee Fruit and Steamship Co.**, 336 U.S. 198 (1949); **FMC Corporation v. Director, OWCP**, 886 F.2d 1185, 23 BRBS 1 (CRT) (9th Cir. 1989); **Director, OWCP v. Cargill, Inc.**, 709 F.2d 616 (9th Cir. 1983); **Director, OWCP v. Newport News & Shipbuilding & Dry Dock Co.**, 676 F.2d 110 (4th Cir. 1982); **Director, OWCP v. Sun Shipbuilding & Dry Dock Co.**, 600 F.2d 440 (3rd Cir. 1979); **C & P Telephone v. Director, OWCP**, 564 F.2d 503 (D.C. Cir. 1977); **Equitable Equipment Co. v. Hardy**, 558 F.2d 1192 (5th Cir. 1977); **Shaw v. Todd Pacific Shipyards**, 23 BRBS 96 (1989); **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989); **McDuffie v. Eller and Co.**, 10 BRBS 685 (1979); **Reed v. Lockheed Shipbuilding & Construction Co.**, 8 BRBS 399 (1978); **Nobles v. Children's Hospital**, 8 BRBS 13 (1978). The provisions of Section 8(f) are to be liberally construed. See **Director v. Todd Shipyard Corporation**, 625 F.2d 317 (9th Cir. 1980). The benefit of Section 8(f) is not denied an employer simply because the new injury merely aggravates an existing disability rather than creating a separate disability unrelated to the existing disability. **Director, OWCP v. General Dynamics Corp.**, 705 F.2d 562, 15 BRBS 30 (CRT) (1st Cir. 1983); **Kooley v. Marine Industries Northwest**, 22 BRBS 142, 147 (1989); **Benoit v. General Dynamics Corp.**, 6 BRBS 762 (1977).

The employer need not have actual knowledge of the pre-existing condition. Instead, "the key to the issue is the availability to the employer of knowledge of the pre-existing condition, not necessarily the employer's actual knowledge of it." **Dillingham Corp. v. Massey**, 505 F.2d 1126, 1228 (9th Cir. 1974). Evidence of access to or the existence of medical records suffices to establish the employer was aware of the pre-existing condition. **Director v. Universal Terminal & Stevedoring Corp.**, 575 F.2d 452 (3d Cir. 1978); **Berkstresser v. Washington Metropolitan Area Transit Authority**, 22 BRBS 280 (1989), **rev'd and remanded on other grounds sub nom. Director v. Berstresser**, 921 F.2d 306 (D.C. Cir. 1990); **Reiche v. Tracor Marine, Inc.**, 16 BRBS 272, 276 (1984); **Harris v. Lambert's Point Docks, Inc.**, 15 BRBS 33 (1982), **aff'd**, 718 F.2d 644 (4th Cir. 1983); **Delinski v. Brandt Airflex Corp.**, 9 BRBS 206 (1978). Moreover, there must be information available which alerts the employer to the existence of a medical condition.

Eymard & Sons Shipyard v. Smith, 862 F.2d 1220, 22 BRBS 11 (CRT) (5th Cir. 1989); **Armstrong v. General Dynamics Corp.**, 22 BRBS 276 (1989); **Berkstresser**, *supra*, at 283; **Villasenor v. Marine Maintenance Industries**, 17 BRBS 99, 103 (1985); **Hitt v. Newport News Shipbuilding and Dry Dock Co.**, 16 BRBS 353 (1984); **Musgrove v. William E. Campbell Company**, 14 BRBS 762 (1982). A disability will be found to be manifest if it is "objectively determinable" from medical records kept by a hospital or treating physician. **Falcone v. General Dynamics Corp.**, 16 BRBS 202, 203 (1984). Prior to the compensable second injury, there must be a medically cognizable physical ailment. **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989); **Brogden v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 259 (1984); **Falcone**, *supra*.

The pre-existing permanent partial disability need not be economically disabling. **Director, OWCP v. Campbell Industries**, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983); **Equitable Equipment Company v. Hardy**, 558 F.2d 1192, 6 BRBS 666 (5th Cir. 1977); **Atlantic & Gulf Stevedores v. Director, OWCP**, 542 F.2d 602 (3d Cir. 1976).

An x-ray showing pleural thickening, followed by continued exposure to the injurious stimuli, establishes a pre-existing permanent partial disability. **Topping v. Newport News Shipbuilding**, 16 BRBS 40 (1983); **Musgrove v. William E. Campbell Co.**, 14 BRBS 762 (1982).

Section 8(f) relief is not applicable where the permanent total disability is due **solely** to the second injury. In this regard, *see* **Director, OWCP (Bergeron) v. General Dynamics Corp.**, 982 F.2d 790, 26 BRBS 139 (CRT) (2d Cir. 1992); **Luccitelli v. General Dynamics Corp.**, 964 F.2d 1303, 26 BRBS 1 (CRT) (2d Cir. 1992); **CNA Insurance Company v. Legrow**, 935 F.2d 430, 24 BRBS 202 (CRT) (1st Cir. 1991). In addressing the contribution element of Section 8(f), the United States Court of Appeals for the Second Circuit, in whose jurisdiction the instant case arises, has specifically stated that the employer's burden of establishing that a claimant's subsequent injury alone would not have caused claimant's permanent total disability is not satisfied merely by showing that the pre-existing condition made the disability worse than it would have been with only the subsequent injury. *See* **Director, OWCP v. General Dynamics Corp. (Bergeron)**, *supra*.

Section 8(f) relief is not available to the employer simply because it is the responsible employer or carrier under the last employer rule promulgated in **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137 (2d Cir. 1955), *cert. denied sub nom. Ira S. Bushey Co. v. Cardillo*, 350 U.S. 913 (1955). The three-fold requirements of Section 8(f) must still be met. **Stokes v. Jacksonville Shipyards, Inc.**, 18 BRBS 237, 239 (1986), *aff'd sub nom. Jacksonville Shipyards, Inc. v. Director*, 851 F.2d 1314, 21 BRBS 150 (CRT) (11th Cir. 1988).

Moreover, employer's liability is not limited pursuant to Section 8(f) where claimant's disability did not result from the combination or coalescence of a prior injury with a subsequent one. **Two "R" Drilling Co. v. Director, OWCP**, 894 F.2d 748, 23 BRBS 34 (CRT) (5th Cir. 1990); **Duncanson-Harrelson Company v. Director, OWCP and Hed and Hatchett**, 644 F.2d 827 (9th Cir. 1981). Moreover, the employer has the burden of proving that the three requirements of the Act have been satisfied. **Director, OWCP v. Newport News Shipbuilding and Dry Dock Co.**, 676 F.2d 110 (4th Cir. 1982). Mere existence of a prior injury does not, *ipso facto*, establish a pre-existing disability for purposes of Section 8(f). **American Shipbuilding v. Director, OWCP**, 865 F.2d 727, 22 BRBS 15 (CRT) (6th Cir. 1989). Furthermore, the phrase "existing permanent partial disability" of Section 8(f) was not intended to include habits which have a medical connection, such as a bad diet, lack of exercise, drinking (but not to the level of alcoholism) or smoking. **Sacchetti v. General Dynamics Corp.**, 14 BRBS 29, 35 (1981); *aff'd*, 681 F.2d 37 (1st Cir. 1982). Thus, there must be some pre-existing physical or mental impairment, *viz*, a defect in the human frame, such as alcoholism, diabetes mellitus, labile hypertension, cardiac arrhythmia, anxiety neurosis or bronchial problems. **Director, OWCP v. Pepco**, 607 F.2d 1378 (D.C. Cir. 1979), *aff'g*, 6 BRBS 527 (1977); **Atlantic & Gulf Stevedores, Inc. v. Director, OWCP**, 542 F.2d 602 (3d Cir. 1976); **Parent v. Duluth Missabe & Iron Range Railway Co.**, 7 BRBS 41 (1977). As was succinctly stated by the First Circuit Court of Appeals, ". . . smoking cannot become a qualifying disability [for purposes of Section 8(f)] until it results in medically cognizable symptoms that physically impair the employee." **Sacchetti, supra**, at 681 F.2d 37.

On the basis of the totality of the record, I find and conclude that the Employer has not satisfied these requirements because the record reflects that Decedent died as a result of his mesothelioma or asbestosis or lung cancer, a fatal disease *per se*. (CX 35)

As Decedent was a voluntary retiree and as benefits are being awarded under Section 8(c)(23) for Decedent's mesothelioma (CX 12), only Decedent's prior pulmonary problems can qualify as a pre-existing permanent partial disability, which, together with subsequent exposure to the injurious stimuli, would thereby entitle the Employer to Section 8(f) relief. In this regard, *see Adams v. Newport News Shipbuilding and Dry Dock Company*, 22 BRBS 78, 85 (1989).

In **Adams**, the Benefits Review Board held at page 85:

"Regarding Section 8(f) relief and the Section 8(c)(23) claim, we hold, as a matter of law, that Decedent's pre-existing hearing loss, lower back difficulties, anemia and arthritis are not pre-existing permanent partial disabilities which can entitle Employer to Section 8(f) relief because they cannot contribute to Claimant's disability under Section 8(c)(23). A Section 8(c)(23) award provides compensation for permanent partial disability due to

occupational disease that becomes manifest after voluntary retirement. **See, e.g., MacLeod v. Bethlehem Steel Corp.**, 20 BRBS 234, 237 (1988); **see also** 33 U.S.C. §§908(c)(23), 910(d)(2). Compensation is awarded based solely on the degree of permanent impairment arising from the occupational disease. **See** 33 U.S.C. §908(c)(23). Section 8(f) relief is only available where claimant's disability is not due to his second injury alone. In a Section 8(c)(23) case, a pre-existing hearing loss, or back, arthritic or anemic conditions have no role in the award and cannot contribute to a greater degree of disability, since only the impairment due to occupational lung disease is compensated. In the instant case, therefore, only Decedent's pre-existing COPD could have combined with Decedent's mesothelioma to cause a materially and substantially greater degree of occupational disease-related disability. Accordingly, Decedent's other pre-existing disabilities cannot serve as a basis for granting Section 8(f) relief on the Section 8(c)(23) claim. Similarly, with regard to Section 8(f) relief and the Section 9 Death Benefits claim, only Decedent's COPD could, as a matter of law, be a pre-existing disability contributing to Decedent's death in this case. The evidence of record establishes a contribution from the COPD to Decedent's death, in addition to respiratory failure from mesothelioma. **See generally Dugas (v. Durwood Dunn, Inc.)**, *supra*, 21 BRBS at 279."

In **Adams**, the Board noted, "there is evidence that prior to contracting mesothelioma, Decedent suffered from chronic obstructive pulmonary disease (COPD), hearing loss, lower back difficulties, anemia and arthritis. The Director argues that Employer failed to establish any elements for a Section 8(f) award based on Claimant's pre-existing chronic obstructive pulmonary disease, back condition, arthritis and hearing loss."

However, in this case at bar, Decedent was in "excellent" health at the time of his voluntary retirement on January 31, 1982, and his breathing problems did not become manifest, and were not diagnosed, until January 22, 1998. (CX 4)

In view of the foregoing, the Employer is not entitled to Section 8(f) relief on the basis of the Board's holding in **Adams**, *supra*.

Section 8(f) relief is not available to the Employer simply because it is the responsible employer or carrier under the last employer rule promulgated in **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137 (2d Cir. 1955), **cert. denied sub nom., Ira S. Bushey Co. v. Cardillo**, 350 U.S. 913 (1955). The three-fold requirements of Section 8(f) must still be met. **Stokes v. Jacksonville Shipyards, Inc.**, 18 BRBS 237, 239 (1986), **aff'd sub nom. Jacksonville Shipyards, Inc. v. Director, OWCP**, 851 F.2d 1314, 21 BRBS 150 (CRT) (11th Cir. 1988).

Moreover, Employer's liability is not limited pursuant to Section 8(f) where Claimant's disability did not result from the

combination of coalescence of a prior injury with a present one. **Duncanson-Harrelson Company v. Director, OWCP**, 644 F.2d 827 (9th Cir. 1981). Moreover, the Employer has the burden of proving that three requirements of the Act have been satisfied. **Director, OWCP v. Newport News Shipbuilding and Dry Dock Co.**, 676 F.2d 110 (4th Cir. 1982).

Decedent was in excellent health when he retired voluntarily in 1982, and his mesothelioma was not diagnosed until January 22, 1998. Mesothelioma, a fatal disease, alone caused Decedent's death, and there was no coalescence or combination with any underlying cardiac disease, and, even assuming the existence of such coalescence, Section 8(f) relief is not permissible pursuant to the Board's holding in **Adams, supra**, a case neither cited nor distinguished by the Employer.

Moreover, the Benefits Review Board has held, as a matter of law, that a decedent's pre-existing hearing loss, lower back difficulties, anemia and arthritis are not pre-existing permanent partial disabilities which can entitle employer to Section 8(f) relief because they **cannot contribute** to decedent's disability under Section 8(c)(23). **Adams v. Newport News Shipbuilding and Dry Dock Company**, 22 BRBS 78, 85 (1989). In **Adams**, the Board held that Section 8(c)(23) compensates "only the impairment due to occupational lung disease" and "only decedent's pre-existing COPD (chronic obstructive pulmonary disease) could have combined with decedent's mesothelioma to cause a materially and substantially greater disease of occupational disease-related disability. Accordingly, decedent's other pre-existing disabilities cannot serve as a basis for granting Section 8(f) relief on the Section 8(c)(23) claim. Similarly, with regard to a Section 9 Death Benefits claim, only decedent's COPD could, as a matter of law, be a pre-existing disability contributing to decedent's death in this case." **Adams, supra**, at 85.

In the case **sub judice**, Respondents have not demonstrated the existence of such pre-existing permanent partial disability and, **a fortiori**, Section 8(f) relief is not available.

The Benefits Review Board has held that the Administrative Law Judge erred in setting a 1979 commencement date for the permanent partial disability award under Section 8(c)(23) since x-ray evidence of pleural thickening alone is not a basis for a permanent impairment rating under the AMA Guides. Therefore, where the first medical evidence of record sufficient to establish a permanent impairment of decedent's lungs under the AMA Guides was an April 1985 medical report which stated that decedent had disability of his lungs, the Board held that the permanent partial disability award for asbestos-related lung impairment should commence on March 5, 1985 as a matter of law. **Ponder v. Peter Kiewit Sons' Company**, 24 BRBS 46, 51 (1990).

While the Death Certificate lists COPD and tobacco use as other significant conditions, Decedent's 40 pack year history ended

in 1982 (CX 4 at 33) and did not result in any medically-recognized symptoms until his hospitalization on January 14, 1998. (CX 4) Moreover, Employer's First Aid records do not reflect any visits by Claimant for pulmonary or respiratory problems. In fact, those records reflect that as of his February 13, 1976 pulmonary function study, Decedent advised that there was no history of lung problems in his family. (EX 19)

Thus, as Decedent's death was due **solely** to his malignant mesothelioma, the Employer and Carrier are not entitled to the limiting provisions of Section 8(f) of the Act.

Attorney's Fee

Claimant's attorney, having successfully prosecuted this matter, is entitled to a fee assessed against the Employer/Carrier ("Respondents"). Claimant's attorney filed a fee application on January 11, 1999 (CX 37), concerning services rendered and costs incurred in representing Claimant between May 7, 1998 and December 10, 1998. Attorney Ronald W. Lupton seeks a fee of \$2,916.05 (including expenses) based on 20.20 hours of attorney time and paralegal time at various hourly rates.

In accordance with established practice, I will consider only those services rendered and costs incurred after May 7, 1998, the date of the informal conference. Services rendered prior to this date should be submitted to the District Director for her consideration.

In light of the nature and extent of the excellent legal services rendered to Claimant by her attorney, the amount of compensation obtained for Claimant and the Respondents' lack of comments on the requested fee, I find a legal fee of \$2,916.05 (including expenses of \$429.05) is reasonable and in accordance with the criteria provided in the Act and regulations, 20 C.F.R. §702.132, and is hereby approved. The expenses are approved as reasonable and necessary litigation expenses. My approval of the hourly rates is limited to the factual situation herein and to the firm members identified in the fee petition.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

It is therefore ORDERED that:

1. The Employer and Commercial Union Companies (Respondents) shall pay to Claimant as Executrix of her husband's estate, compensation for his one hundred (100) percent permanent partial impairment from January 14, 1998 through February 24, 1998, based upon the National Average Weekly Wage of \$417.87, such compensation to be computed in accordance with Sections 8(c)(23) and (2)(10) of the Act.

2. The Respondents shall pay Decedent's widow, Corinne B. Bessey, ("Claimant"), Death Benefits from February 25, 1998, based upon the National Average Weekly Wage of \$417.87, in accordance with Section 9 of the Act, and such benefits shall continue for as long as she is eligible therefor.

3. The Respondents shall reimburse or pay Claimant reasonable funeral expenses of \$2,820.00, pursuant to Section 9(a) of the Act.

4. Interest shall be paid by the Respondents on any accrued benefits at the T-bill rate applicable under 28 U.S.C. §1961 (1982), computed from the date each payment was originally due until paid. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director. Interest shall also be paid on the funeral benefits untimely paid by the Respondents.

5. The Respondents shall furnish such reasonable, appropriate and necessary medical care and treatment as the Decedent's work-related injury referenced herein may have required between January 15, 1998 and February 25, 1998, including reimbursement of out-of-pocket medical expenses totalling \$1,014.80 (CX 11), subject to the provisions of Section 7 of the Act.

6. The Employer shall pay to Claimant's attorney, Ronald W. Lupton, the sum of \$2,916.05 (including expenses) as a reasonable fee for representing Claimant herein before the Office of Administrative Law Judges between May 7, 1998 and December 10, 1998.

DAVID W. DI NARDI
Administrative Law Judge

Dated:

Boston, Massachusetts

DWD:ln